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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fourth session

SUMMARY RECORD (PARTIAL)* OF THE 443rd MEETING

Held at the Vienna International Centre, Vienna,
on Wednesday, 12 June 1991, at 9.30 a.m.

Chairman: Mr. SONO (Japan)

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* No summary record was prepared for the rest of the meeting.

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The discussion covered in the summary record began at 10.00 a.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 2 (continued)

1. Mr. BERGSTEN (Secretary of the Commission), recalling the discussion that had taken place in the previous meeting, invited the members of the Commission to propose alternatives to the word "bank" for adoption by the Commission.

2. The CHAIRMAN said that an alternative word for "bank" was undoubtedly needed but that a decision was not required immediately, so there was time for reflection.

3. In the absence of any comments on article 2(g) and (h), he took it that the Commission wished to adopt those definitions.

4. It was so decided.

5. The CHAIRMAN invited the Commission to consider article 2(i).

6. Mr. BERGSTEN (Secretary of the Commission) drew the Commission's attention to a drafting error in the French version of article 2(i). To reflect the concept of "includes", it would be necessary to insert a word such as "notamment" in the first line, between "on entend" and "le crédit porté".

7. The CHAIRMAN said the matter could be left to the drafting group. In the absence of any other comments, he took it that the Commission wished to adopt article 2(i).

8. It was so decided.

9. The CHAIRMAN invited the Commission to consider article 2(j). He drew attention to the comments by the Government of the United States of America (A/CN.9/347/Add.1, p. 12) where it was proposed to amend the definition of "authentication" by deleting the words "all or part of" and inserting, after the words "payment order", the words "an amendment of a payment order".

10. The Government of Canada wished to enlarge the definition of "authentication" by referring to procedures to detect error (A/CN.9/347, p. 5, section VI). However, the Working Group had regarded "authentication" as relating only to identification of the source and had decided to treat detection of error as a distinct question. The Working Group had drafted the current text accordingly.

11. Mr. HUANG Yangxin (China) said he agreed with the United States proposal, which did not exclude a procedure whereby one part of the payment order was authenticated in order to provide authentication of the whole.

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12. He would also like to know whether, with due regard for article 4A of the Uniform Commercial Code of the United States, a comparison of signatures constituted an authentication procedure. Since the Model Law did not exclude transfers effected by means of documents, he thought that authentication would have to include a comparison of signatures.

13. Mr. BHALA (United States of America) said that the reason for his Government's proposal was to be found in the realities of banking practice. Payment orders were authenticated only in their entirety, not in part. In the event of amendment, the amendment was likewise authenticated in its entirety. The Model Law should reflect operational reality as closely as possible in order to gain acceptance in the commercial world.

14. Mr. LIM (Singapore) said that, while he thought that the reference to part of a payment order would encompass an amendment to a payment order, he had no objection to the United States proposal.

15. Ms. KOSKELO (Observer for Finland) said that her only difficulty with the United States proposal was that the Model Law made no reference elsewhere to amendments of payment orders. To introduce the concept at that stage might give rise to problems and confusion. In her own view, an amendment to a payment order, for example to change the amount, constituted a new payment order. The receiving bank would need to consider separately whether to accept it or not. She therefore felt that the definition of "authentication" should refer only to payment orders and revocation of payment orders.

16. Mr. ABASCAL ZAMORA (Mexico) said he agreed with the reasoning of the observer for Finland. During the preparation of the initial drafts of the Model Law, the inclusion of "amendments" to payment orders had been considered but rejected, because of the difficulties arising therefrom. Consequently, the existing text referred only to payment orders and the revocation of payment orders.

17. Mr. BERGSTEN (Secretary of the Commission) drew the Commission's attention to the Secretariat's comments on the subject (A/CN.9/346, p. 64, para. 3), which gave the history of consideration by the Working Group of the possible inclusion in the Model Law of a reference to "amendments" to payment orders.

18. Mr. CONOBOY (United Kingdom) said he had no difficulty with the deletion of "all or part of". The representative of China had rightly pointed out that authentication could be applied to certain elements of a payment order in order to determine the authenticity of the whole payment.

19. On the question of "amendment", he shared the concerns of the observer for Finland. He understood that the Working Group, whether implicitly or explicitly, had decided not to include "amendments".

20. Mr. DE BOER (Netherlands) pointed out that article 2 began with the words "For the purposes of this law:". Article 2 should therefore define only terms that were used elsewhere in the Model Law, and "amendments" were not so used.

21. The CHAIRMAN said that, from the views expressed, it appeared that the Commission wished to follow the recommendation of the Working Group and make no reference to "amendments" of payment orders. He also took it that the Commission was prepared to accept the proposed deletion of the words "all or part of" from article 2(j).

22. It was so decided.

23. The CHAIRMAN invited the Commission to consider the suggestion by the Government of Finland (A/CN.9/347, p. 16) that the sentence "The term does not include comparison of a signature with a specimen." should be added at the end of article 2(j).

24. Ms. KOSKELO (Observer for Finland) said that the question was whether the provisions of paragraphs 2, 3 and 4 of article 4 should apply to a signature comparison. In her view, that was not the intention, the case where an unauthorized person forged a signature being covered by article 4(1). Consequently, it should either be made clear in the definition that a comparison of signatures did not constitute authentication for the purposes of the Model Law or else the point could be dealt with in article 4.

25. Mr. ABASCAL ZAMORA (Mexico) said that documented payment orders were widely used in national and international trade, where electronic means were not available, and the normal method of authentication was still the signature or other simple means of identification. Comparison of signatures was also a commercially reasonable method of security as specified in article 4(2). The Finnish proposal to exclude the possibility of signature comparison would be restrictive and would run counter to the autonomy of the parties concerned. It was therefore unacceptable.

26. Ms. KOSKELO (Observer for Finland) said that there appeared to be a misunderstanding. Her delegation had no wish to exclude authentication by signature. The problem was that if paragraphs 2 to 4 of article 4 were extended to cover authentication of signatures, the liability of the person whose signature had been forged would also be extended, beyond the provisions of the general rules of law - at least in her own country's legal system - and that was undesirable. She therefore considered that the use of a signature to authorize a payment order should be covered by article 4(1) and that the provisions of article 4, paragraphs 2 to 4 should not be extended.

27. Mr. SCHNEIDER (Germany) said that, as a general rule, the sender was not bound if his signature was forged by a third person. If, however, the parties had agreed to the authentication procedure and if the forgery resembled the genuine signature, the sender would be bound. That might not be a commercially reasonable procedure under article 4(2), but, if a large sum of money was involved, the parties might well agree that a mere verification of the signature would not be enough. It would be better to leave the problem to agreement between the parties and keep article 4 unchanged.

28. Mr. HUANG Yangxin (China) said that, in his opinion, the forged signature problem could not be solved by article 4(1) alone. The parties concerned would have to ascertain whether a signature was genuine or not. It would be

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dangerous if the authentication procedure were as simple as the observer for Finland seemed to believe. In his view, the problem must be solved by the parties. If a large sum were involved, they could agree on additional methods of authentication, for example by telegram.

29. Mr. ERIKSSON (Observer for Sweden) said he agreed with the observer for Finland that the problem was not simply one of definition under the Model Law, but concerned the law on the liability of parties. It might be better to deal with it under article 4.

30. Comparison of signatures was the normal method of authenticating documented orders and should obviously not be excluded by the rules of the Model Law. Paragraphs 2 to 4 of article 4 placed the liability in the case of a forged signature on the person whose signature had been forged and the Finnish proposal, which had the merit of limiting that possibility, deserved further discussion.

31. Mr. VASSEUR (Banking Federation of the European Community) said that a mere reference to a signature would not solve all the difficulties, because many payment orders were given without a written signature on paper - for example by telex or electronically. One of the problems of concern to his Federation was how electronic signatures were to be treated and whether a code was necessary. In his own opinion, the issue was covered by article 2(j), although it might be necessary to specify what types of signature were meant, such as handwritten or electronic.

32. Mr. LIM (Singapore) said he agreed with the preceding speaker. He suggested, moreover, that provision should also be made for facsimile signatures.

33. Mr. DE BOER (Netherlands) said that, like the observer for Finland, he thought that signature comparison would not normally come under the authentication procedure referred to in paragraphs 2 to 4 of article 4. Provision must be made, however, for the parties to agree and the solution might be to adopt the Finnish proposal with the addition of wording on the following lines: "unless the parties expressly agree otherwise."

34. Ms. KOSKELO (Observer for Finland) said that she would be satisfied to defer the discussion until article 4 came up for consideration. The core of the problem was whether the rules on distribution of risk under paragraphs 2 to 4 of article 4 were reasonable in the case where a signature was used. In her opinion they were not, because the provisions on authentication were based on the use of a secret code or password, whereas a signature was visible to all and could never be kept secret. The signer was always vulnerable, because a signature could always be forged.

35. Mr. TCHERNYCHEV (Union of Soviet Socialist Republics) said that he understood the concern of the observer for Finland about the possibility of forgery and whether the bank or the client was liable. In practice, however, banks and clients normally worked on the basis of signatures and working

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methods were subject to agreement between them. A client concerned about the possibility of forgery could always ask the bank to use other methods of verification in addition to the authentication of a signature. There was nothing in article 4 to prevent agreement between the parties and, in any case, the possibility of forgery was exceptional.

36. Mr. HERZBERG (Observer for Israel) said that a payment order or a cheque with a forged signature was not, in fact, an order to pay even if, in extreme cases, a bank might have to make the payment.

37. Mr. AL-NASSER (Observer for Saudi Arabia) said that the observer for the Banking Federation of the European Community had drawn attention to a possible solution whereby the Commission must make it clear whether it was dealing with electronic transfers or traditional payment orders. In the case of documented paper orders, signature comparison would raise no problems, because the official receiving and executing the payment order would have the sender's signature and would be able to make the necessary comparison. In the case of electronic transfers, there were three possibilities: transfer by telephone, where there would always be a bank official who knew the originator and it would be difficult to imitate a voice; transfer by telegram, where the bank would request verification by the sender and the possibility of forgery was practically nil; and electronic payment orders, which could be compared with traditional payment orders. As indicated by the observer for Finland, forgery was one of the risks in the execution of payment orders, just as there was always a risk that banknotes might be forged.

38. Mr. ERIKSSON (Observer for Sweden) said that, in his opinion, the sender should be bound by article 4(1) only. He would therefore like to see the Finnish suggestion amended by the addition of words on the following lines: "The term does not include a method which contains merely comparison of a handwritten signature with a specimen". If that change were made he would be satisfied with the suggestion.

39. Mr. CONOBOY (United Kingdom) said that he would prefer not to deal with the issue under the definition of authentication, i.e., he would not favour changing a definition which had a reasonably wide internationally accepted meaning so as to exclude signatures. The matter should be dealt with in article 4.

40. He accepted the point made by the observer for Finland that the Model Law would change domestic law in some countries - possibly including his own. His delegation's views had been well expressed by the representative of the Union of Soviet Socialist Republics, and he welcomed the emphasis on the agreement between parties. He could see no justification for excluding handwritten signatures, which could be transmitted by electronic means and could even be written on a screen. Banks in the United Kingdom were already investing heavily in procedures for the electronic verification of signatures, and banks and their clients might well reach agreement in the future concerning electronic verification.

41. THE CHAIRMAN said that, regarding the allocation of the risk of forgery, it was common knowledge that the approaches adopted by common and civil law were in conflict. The Convention on International Bills of Exchange and International Promissary Notes provided a partial solution to the problem through its broad definition of the concept of "signature", but it was not yet in force.

42. The concern expressed by the representative of Finland that signatures were too easy to imitate to be admitted as a method of authentication was partly answered by the qualification "commercially reasonable" in article 4(2)(a) and 4(3). At any rate, it seemed clear that no reference to signatures should be included in the definition of "authentication" in article 2(j). That would not, of course, imply that signatures as a means of authentication were to be excluded.

43. Noting that the current text of the Model Law distinguished between the detection of error and identification of the source, he said it appeared that there was no support for the Canadian proposal to enlarge the definition of authentication to include the detection of error. In the absence of such support, the distinction between source and error issues would continue to be made.

44. Inviting consideration of article 2(k), he noted that the term "execution" was defined separately in article 2(1) and that that paragraph might be adjusted at a later stage in view of the proposal by the representative of Singapore to transfer to it the second sentence of article 2(f).

45. Ms. KOSKELO (Observer for Finland) said that the reference to article 10 might better be omitted from the definition of "execution date", since it was inappropriate to refer to substantive articles in a definition.

46. The CHAIRMAN reminded the Commission of the United Kingdom delegation's intention to propose a reference to a more specific paragraph of article 8 in connection with article 2(1).

47. U NYI NYI THAN (Observer for Myanmar) said he supported the Finnish suggestion that the reference to article 10 in article 2(k) should be deleted.

48. Mr. GREGORY (United Kingdom) said he had no strong feelings about the Finnish suggestion; his only theoretical objection to the inclusion in a definition of a reference to other provisions of a law would be on the grounds of circularity. In other words, one should not refer in a definition to a provision in the law which itself referred to that definition, but one might quite legitimately identify an idea by reference to the provision of the law in which it appeared, as in the current case.

49. There was, however, a more serious technical problem of circularity in connection with the concept of "execution date", a problem that was described in detail in his Government's comments on the Model Law (A/CN.9/347, p. 54, para. 3). The circularity of the Model Law's provision was due to the fact that, under article 4(6), a sender was not obliged to pay for a payment order until the execution date, but it was also implicit in article 10 that a

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payment order did not have to be executed until it had been accepted while, under articles 6(2)(a) and 8(1)(a), acceptance did not take place until payment was received. Since the purpose of the Model Law was to ensure efficient credit transfer mechanisms, the Working Group had adopted the concept that a bank failing to act on receipt of a payment order was deemed to have accepted it if payment for the order had been received and would therefore incur obligations under the Law as a result of its failure to take action. His own and other delegations had submitted proposals to eliminate the technical problem of circularity with regard to the provisions in the current text relating to payment, execution and acceptance.

50. Furthermore, in most places where the terms "execution" and "execution date" appeared in the text, they were still in square brackets because final agreement had still to be reached on the definition of "execution" and, in particular, on its application to the beneficiary's bank.

51. The CHAIRMAN said that, in its comments contained in document A/CN.9/347, the United Kingdom Government proposed that the term "payment date" should be used only in article 10(1)(b) and be replaced elsewhere by the term "execution date". If article 10(1)(b) were then redrafted to include a definition of "payment date", the definition of the term in article 2(m) would become superfluous.

52. Mr. GREGORY (United Kingdom), noting that the Commission might wish to discuss the question separately, said that the use of the term "payment date" in the Model Law was problematic because payment orders often specified no payment date. The term should not, therefore, be defined by reference to a specific provision appearing in a payment order. Secondly, in many cases where the term appeared in the text, a reference to the "execution date" was more appropriate, particularly if the definition of "execution" were amended in the way his delegation suggested. Wherever it was genuinely appropriate to refer to a date specified in the payment order as the date when funds were to be placed at the beneficiary's disposal, that idea could be expressed in full. However, if the Commission felt that a definition of the term "payment date" would none the less be helpful, his delegation would not oppose its inclusion.

53. With regard to the definition of "execution", he wished simply to refer to his Government's proposals in paragraph 4 of its comments (A/CN.9/347, p. 54), in which the definition was adapted to include the beneficiary's bank. The Commission could take up one or other of two approaches: it could either invent a new term for making money available to the beneficiary through the beneficiary's bank or it could include that concept in the definition of execution. His delegation preferred the latter approach.

54. Mr. BHALA (United States of America) said that, on the question of whether or not a reference to article 10 should be included in the definition of "execution date", he shared the views of the representative of the United Kingdom. He did not agree, however, that the problem of circularity in connection with the provisions on payment, execution and acceptance was a

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purely technical one. The underlying problem concerned the concept of "deemed acceptance", which the Commission might wish to consider at a later stage in connection with articles 6(2)(a) and 8(1)(a). In his delegation's view, the concept of "deemed acceptance", as it appeared in the current text, was objectionable and did nothing to promote the efficiency of credit transfer mechanisms or to facilitate trade.

55. His second concern was that the proposals on the current question would, if accepted, entail a wholesale and unnecessary revision of what was already a workable document.

56. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said he supported the Finnish suggestion that the reference to article 10 in the definition of "execution date" be deleted, because it introduced a condition into what should, by its very nature as a definition, be abstract and unconditional.

57. The CHAIRMAN said he took it that any decision by the Commission to delete or not to delete the reference to article 10 in article 2(k) would depend on the decision it reached concerning article 2(1).

58. Mr. LIM (Singapore) said that, if the Finnish suggestion that the reference to article 10 be deleted were accepted, the words "should execute" in article 2(k) would need to be changed to "is required to execute".

59. The CHAIRMAN said that the point would be considered when the text was being finalized.

60. He invited the Commission to consider article 2(1). The definition of "execution" in that subparagraph did not include action by a beneficiary's bank, because it had been assumed that the relationship between a beneficiary's bank and a beneficiary was outside the chain of credit transfers. Nevertheless, the drafting of the Model Law might be facilitated if the term "execution" could also be used with reference to action by a beneficiary's bank. He invited comments on that point.

61. Mr. ABASCAL ZAMORA (Mexico) said there was little point in defining execution by the beneficiary's bank, when article 17(1) stated that a credit transfer was completed when the beneficiary's bank accepted the payment order.

62. The CHAIRMAN said that a definition of "execution" which included action by the beneficiary's bank would make it possible to remove some square brackets throughout the text.

63. Mr. LE GUEN (France) said he agreed with the representative of Mexico. Moreover, he thought that any inclusion of action by the beneficiary's bank in the definition of "execution" would tend to reopen a discussion that had already been closed, regarding the time at which a transfer operation was concluded. The question of removing square brackets was a relatively minor one.

64. Mr. GREGORY (United Kingdom) said he thought it was agreed that the general approach was that the Model Law should not intervene between the beneficiary and beneficiary's bank. Nevertheless, some provisions in the Model Law did require the beneficiary's bank to make the money received available to the beneficiary, so that a term was needed to describe the action in question.

65. There would seem to be no danger in using the term "execution", on the understanding that it was not intended that the substantive provisions of the Law should intervene in the relationship between the beneficiary and the beneficiary's bank, except in the situations already agreed upon by the Working Group. Use of the term "execution" would not prejudice the rule in article 17(2) that a transfer would be completed when the beneficiary's bank accepted the payment order.

66. Mr. LOJENDIO OSBORNE (Spain) said it was questionable whether the fact that a credit transfer was completed when the beneficiary's bank accepted a payment order placed the relationship between that bank and the beneficiary outside the scope of the Model Law, particularly in the light of article 9 covering the obligations of the beneficiary's bank and the rights of the beneficiary. He could thus see no objection to the inclusion in the definition of a reference to action by the beneficiary's bank.

67. Mr. FUJISHITA (Japan) said he agreed with the comments made by the representative of the United Kingdom and supported the inclusion of a reference to actions by the beneficiary's bank in the definition. That was, however, a substantive point and not merely a drafting one.

68. Mr. SCHNEIDER (Germany) said he thought that the viewpoints of the representatives of the United Kingdom and France could be reconciled. While he was not opposed to mentioning action by the beneficiary's bank in the definition of execution, it should be made clear that the reference was to rules already included in the Model Law.

69. The CHAIRMAN assured the last speaker that the proposed change in subparagraph 1 was not intended to affect other rules in the Model Law.

70. Ms. KOSKELO (Observer for Finland) said she agreed with the representatives of the United Kingdom and Spain that certain provisions of the Model Law, such as articles 9 and 10, did apply to the beneficiary's bank and that that aspect should be covered in the definition.

71. Mr. BERGSTEN (Secretary of the Commission) explained that the earliest drafts prepared by the Secretariat had used the term "execution" in a sense which covered action by a beneficiary's bank because a number of policy decisions on that point had not yet been taken, particularly with regard to the extent that the Model Law should cover the relationship between a beneficiary and a beneficiary's bank. At a later stage, the general policy decision had been made that the effect of the Model Law would end when a beneficiary's bank accepted a payment order. The idea of execution by a beneficiary's bank thus became more problematic, but the term had been retained because the Working Group had not yet had occasion to consider that aspect.

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72. A related problem was that some payment orders, such as SWIFT, did not specify a payment date. If a payment date was specified by the originator, it was a matter of interest not only to the beneficiary's bank and the beneficiary but also to the originator. That concern was reflected in article 10(1)(b).

73. Article 9(1) had been inserted because it was felt that the text would be incomplete if the entire idea was left out, in view of the end purpose of the activity. Without specifying when the beneficiary's bank would have to make funds available - except in cases in which a payment order designated a payment date - or how it should be done, article 9(1) had been added more or less pro memoria.

74. At the twenty-second session, a proposal had been adopted that execution should be defined, partly on systematic grounds, reinforced by the idea that the effect of the Model Law should stop at that point.

75. He himself was not arguing either for or against the point at issue. The Working Group had noted a number of passages in which the term execution would apply to the beneficiary's bank and square brackets had been added to bring those passages to the attention of the Commission.

76. The CHAIRMAN suggested that a drafting group, consisting of the representatives of the United Kingdom, Finland and Japan, should prepare a single text of the subparagraph for consideration at the afternoon meeting.

77. It was so decided.

The meeting rose at 12.40 p.m.